

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

SODEXHO SCHOOL SERVICES

Employer

and

GINA MAGILL, An Individual

Petitioner

and

HOTEL & RESTAURANT EMPLOYEES UNION  
LOCAL 217, AFL-CIO

Union

Case 1-RD-2019

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The Union is a labor organization within the meaning of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The parties stipulated, and I find, that the Employer is a Delaware corporation engaged in the food services business at various work sites in Pawtucket, Rhode Island. The Employer and the Union have been parties to a collective-bargaining agreement covering the Employer's food service workers in several schools in the Pawtucket, Rhode Island school system.

The facts are not in dispute and the salient facts are described below. The single issue raised by this proceeding is the legal issue of whether an agreement reached between an Employer and a Union can be a bar to an election where the agreement was not signed by both parties prior to the filing of a decertification petition. The Union contends that there was an agreement in place and the Employer partially implemented it before the petition was filed and as such, the agreement should constitute a bar to an election. The Petitioner and the Employer, on the other hand, maintain that since there was no writing signed by both parties, there is no contract bar. Based on existing case law and the facts as found below, I find that there is no contract bar to an election.

## I. FINDINGS OF FACTS

The Union and the Employer have enjoyed a successful bargaining relationship since 1996. Their last collective-bargaining agreement expired by its terms on April 23, 2003.<sup>1</sup> The parties began negotiating for a new agreement on March 12. After approximately eleven negotiation sessions from March 12 through August 25, the parties reached final agreement on the terms of a successor contract. Throughout the negotiation sessions, the parties reached a series of tentative agreements. The Union noted next to each tentative agreement the date that the agreement was reached, but the employer did not make any corresponding notation. On August 25, the parties agreed that should the membership ratify the agreed-upon contract, its terms would go into effect immediately.

On September 3, the Union presented the contract to the membership for ratification. The membership ratified the contract. The Employer was so notified immediately. The following day, September 4, the Union, through its Chief Negotiator Linda Rosati, sent a fax to the Employer's Director of Labor Relations, Jerry Vincent, asking him to review the tentative agreements and initial each section, thereby indicating his approval.<sup>2</sup> On September 11 (a Thursday), not having heard from Vincent, Rosati called him and reminded him to return the fax with his initials. Vincent informed her that he had not received the prior fax and asked her to fax the document to him again. Rosati did.<sup>3</sup>

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<sup>1</sup> All dates are in 2003, unless otherwise noted.

<sup>2</sup> Vincent was the Employer's Chief Negotiator during bargaining.

<sup>3</sup> On September 15, the Union filed charge 1-CA-41246, alleging that the Employer failed to implement newly negotiated and ratified changes in the contract. I take administrative notice of the charge. That charge was ultimately withdrawn. By the parties' past practice, the Employer would implement the terms

On Friday, September 12, Petitioner Gina Magill filed this decertification petition. On Monday, September 15, Vincent faxed the tentative agreements with his initials to Rosati. In addition, Vincent informed Rosati that, consistent with their past practice, the Employer was implementing the terms of the contract. There is no evidence that the Employer intentionally delayed signing the contract or had knowledge of the decertification petition prior to its filing.

## II. APPLICABLE LAW, ANALYSIS, AND CONCLUSION

The applicable law is clear. It is well settled that a collective-bargaining agreement will serve as a bar to an election, if that agreement satisfies certain formal and substantive requirements. The agreement must be signed by the parties prior to the filing of the petition that it would bar, and it must contain substantial terms and provisions of employment sufficient to stabilize the parties' bargaining relationship. Seton Medical Center;<sup>4</sup> Appalachian Shale Products Co.<sup>5</sup> The requirement that a contract be in writing can be satisfied by the signing of informal documents covering substantial terms and conditions of employment, even though it is contemplated that the contract will be formally executed by the parties at a later date. Television Station WVTM.<sup>6</sup> The burden of proving that a contract is a bar to an election is on the party asserting the doctrine. Roosevelt Memorial Park.<sup>7</sup>

As the party claiming that the contract is a bar to the petition, the burden is on the Union. I find that the Union did not meet its burden for the following reasons. There is no question that the parties reached agreement prior to the filing of the petition. The issue that I must decide is whether the agreement that was reached constitutes a bar to an election. Case law in this area is clear that unless a signed contract by all the parties precedes a petition, the contract does not bar an election even though the parties consider it properly concluded and have put into effect some or all of its provisions. Appalachian Shale.<sup>8</sup>

The facts of this case are akin to those in DePaul Adult Care Communities, Inc.<sup>9</sup> There, the Board addressed a Union's argument that a collective-bargaining agreement that was reached, but not signed by the Employer before a decertification petition was filed, served as a bar to that petition. The Board, relying on Appalachian Shale, rejected the Union's argument and held that without the Employer's signature on the collective-bargaining agreement, or some document referring thereto, the agreement was

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of the contract upon notice of ratification. In fact, the Employer began implementation of the terms of the new contract on September 15.

<sup>4</sup> 317 NLRB 87 (1995).

<sup>5</sup> 121 NLRB 1160 (1958).

<sup>6</sup> 250 NLRB 198, 199 n.1 (1980).

<sup>7</sup> 187 NLRB 517 (1970).

<sup>8</sup> Supra, at 1162. For this reason, I do not find relevant suggestions that the Employer may have departed from past practice by not immediately implementing the new contract upon notice of ratification.

<sup>9</sup> 325 NLRB 681 (1998).

insufficient to act as a bar.<sup>10</sup> For the same reasons, I must find that the agreement here does not constitute a bar because of the absence of the Employer's signature on the agreement or documents referring thereto.

The Union argues that I should not entertain the petition in order to encourage the collective bargaining process and hold the parties accountable to the commitments made during negotiations. In support of its argument, the Union relies primarily on Montgomery Ward & Co.<sup>11</sup> In that case, the Board found that an Employer violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain with a newly recognized union after a majority of the employees signed a decertification petition. The seventh circuit enforced the Board order reasoning that petitions filed under these circumstances present an apparent conflict between the Act's two important goals of preserving a free employee choice of bargaining representatives and encouraging the collective bargaining process. The circuit court upheld the Board's longstanding policy of precluding a decertification election within a year following certification.<sup>12</sup>

Montgomery Ward is distinguishable. The question here is not whether to allow the decertification petition within a year following certification. Rather, the question here is whether the newly reached contract, which was not signed by the Employer, can constitute a bar to an election. As stated above, I find that it cannot. See Appalachian Shale;<sup>13</sup> Yellow Cab.<sup>14</sup> In balancing the Act's twin goals of protecting employees' right of self-determination and preserving industrial stability by supporting the collective bargaining process, the Board must necessarily draw lines. In the case of the contract bar rule, the line that the Board has chosen to draw is clear: a writing evidencing the agreement must be signed by both parties. There is no dispute that prior to the filing of this petition, the employer had not signed such a writing. Under these circumstances, the Board's interest in assuring employee self-determination predominates. I therefore will order an election.<sup>15</sup>

5. Accordingly, on the basis of the foregoing and the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time food service workers, including service workers and drivers, employed by the Employer at the following schools in Pawtucket, Rhode Island School System: Shea High School, Tolman High School, Jenks Junior High School, Slater Junior High School, Goff Junior

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<sup>10</sup> Id. at 682.

<sup>11</sup> 399 F.2d 409, 412 (7<sup>th</sup> Cir. 1968).

<sup>12</sup> Id., at 410.

<sup>13</sup> Supra.

<sup>14</sup> 131 NLRB 239 (1961).

<sup>15</sup> In any event, the Employer is not free to ignore the contract that it has negotiated with the Union, as it implicitly seems to have conceded by implementing its terms as of September 15. Only if the Union were determined, through the election, to lack support of a majority of employees, would the Employer be released from its contractual obligations.

High School, Potter-Burns School, Greene School, Fallon School, Curtis School, Curvin-McCabe School, Winters School, Baldwin School, Cunningham School, Little School, Varieur School, and Winters Annex School, but excluding managers, office clerical employees, students, substitutes, casual and temporary employees, guards, and supervisors as defined in the National Labor Relations Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Hotel and Restaurant Employees Union Local 217, AFL-CIO.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercises of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U. S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts 02222-1072, on or before January 9, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 16, 2004.

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Rosemary Pye, Regional Director  
National Labor Relations Board  
First Region  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Sixth Floor  
Boston, Massachusetts 02222-1072

Dated at Boston, Massachusetts,  
this 2<sup>nd</sup> day of January, 2004.

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